No. 6543

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, and EMMETT LAWLER,

Appellants,

vs.

THE CHARLES NELSON COMPANY, a Corporation, and FIREMAN'S FUND INSURANCE COMPANY, a Corporation,

Appellees.

BRIEF FOR APPELLANTS.

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STATEMENT OF THE CASE.

This is an action instituted by the employers of Emmett Lawler, the Charles Nelson Company, and the insurance carrier, Fireman's Fund Insurance Company under Section 21 of the Longshoremen's and Harbor Workers' Compensation Act (23 U. S. C. A. 921), for the purpose of reviewing an award of War-

ren H. Pillsbury, Deputy United States Compensation Commissioner. The District Court, Southern Division, Northern District of California, enjoined the award of the deputy commissioner and appellants have appealed from said judgment (Tr. p. 24).

The claimant, Emmett Lawler, suffered an injury while employed by the Charles Nelson Company as a stevedore. The deputy commissioner computed the amount of the award of compensation by applying the provisions of Subdivision B of Section 910 of the Act and the District Court held that he should have applied the provisions of Subdivision C of Section 910.

A brief statement of the pertinent facts in the case is as follows: The claimant, Lawler, during the year preceding his injury lost three months work on account of illness. In the remaining nine months he worked less than five days a week. He earned about $100 per month while working (Test. Ex. "A", p. 3). He went to the waterfront daily looking for work. He worked every ship he had a chance (Test. Ex. "A", p. 2) and reported for work six days a week. One W. Davidson worked as a stevedore 297 days during the year preceding claimant's injury and received as wages the sum of $2,138.95. Davidson was a member of a steady gang and the Commissioner used the average daily wage of Davidson in computing the compensation of Lawler under Section 10-B (Test. Ex. "B", p. 4).

Certain evidence was taken concerning the conditions of employment among longshoremen and stevedores in San Francisco from which evidence it appeared that these men may be roughly classified into three groups each comprising approximately one-third of the total number doing this type of work. The first group consists of the members of regular gangs steadily employed; the second class less regularly employed; the third class the freelances or prospectors (Tr. pp. 19, 20). There is also testimony of one Emil G. Stein, secretary and treasurer of the Longshoremen's Association in San Francisco. Mr. Stein testified that he had been connected with the waterfront situation for the past sixteen years and that there was only one class of stevedores. That there are good, bad and indifferent stevedores but only one class, and that he never heard it mentioned during his eleven years as secretary of the organization that there were three classes of stevedores (Tr. testimony Exhibit "D", pp. 40-42). All stevedores are paid at the rate of 90¢ an hour (Test. Ex. "C", p. 14).

The deputy commissioner made the following findings of fact material to this inquiry (Tr. Ex. "F", p. 1):

1. That the employee worked for less than five days a week during such portion of the year preceding his injury as he was engaged in stevedoring work, and in addition was confined to a hospital for three months

out of said year and therefore did not work for substantially the whole of said year; that except for said period of three months he was ready and willing to work and continuously seeking work as a stevedore.

2. That another stevedore employed at the same port during the same year, to wit, one H. Davidson, worked on 297 days out of said year and earned in such employment $2,138.95.

3. That claimant's average annual earnings are therefore fixed under Section 910-B of said Act upon the basis of said wages of Davidson.

SPECIFICATIONS OF ERRORS.

The specifications of errors (Tr. pp. 30, 31), all present substantially the same question, to wit: Was there any competent evidence to support the order of the deputy commissioner in fixing compensation under the provisions of Subdivision B of Section 910 of the Act?

The court erred in holding there was none.

ARGUMENT.

Under the authority of

Minnie Gunther v. U. S. Employees' Compensation Commission, 41 F (2d) 151,

the deputy commissioner in fixing compensation, applied the provisions of Subdivision (b) of Section 910 of the Act.

The provisions of the Act relative to fixing the compensation, are as follows:

> "Sec. 910. Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.
>
> (b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole

of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the annual average earnings of an injured employee cannot reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings."

Appellees and the District Court attempted to distinguish this case from the *Gunther* case upon the theory that the class of employees known as stevedores is divided into three distinct classes, the basis for the classification being the number of days a stevedore worked during the year, or, in other words, the amount of wages a stevedore would earn during the year (Tr. pp. 19-20), and that because of such classification W. Davidson was in a different class than claimant and the deputy commissioner therefore should not have awarded compensation on the

basis of Davidson's earnings. However, in so far as the port of San Francisco is concerned there is a conflict of testimony as to whether or not there was a known recognized classification of stevedores, and the Commissioner was entitled to find, under the testimony of witness Stein that stevedores were not divisible into two classes.

The deputy commissioner's decision upon a question of fact where there is a conflict of evidence, is conclusive, and will not be disturbed by the courts.

> *Northwestern Stevedoring Co. v. Marshall, etc. Matheson,* 41 F. (2d) 28;
> *Pocahontas Fuel Co. v. Monahan,* 34 F. (2d) 549, affirmed 41 F. (2d) 48.

The finding by the District Court that a certain classification of longshoremen and stevedores exists in San Francisco, based upon the amount of money which such individuals have been able to earn in that occupation during the year by reason of the variating period of time during which they may have been able to secure employment, does not seem to be within the meaning of Section 910 of the Longshoremen's Act. To determine for compensation purposes the class to which a man belongs with reference merely to the total amount of money which he has been able to earn, seems to be reasoning in a circle, necessarily eliminating entirely the conception of classification in the industry and leaving for consideration only the single fact of the total individual earnings shown.

It would appear to appellant that the intent of Section 910 of the Act was to give to every man compensation directly related to the wages which he was in fact earning upon the day upon which he was injured. Such earnings manifestly are the earnings of the class to which he belongs and as a member of which he is employed at the time of his injury. The term "class" as thus used, relates to the character of the work which the man was doing in order to earn wages and not primarily to the amount of wages so earned. From this point of view longshoremen may be classified, for example, as gang foreman, hatch tender, winch driver, or the like, and undoubtedly a variation in wages received, and consequently of earning capacity, would thus appear. However, doubtless because of free interchange of such classes of work by individuals, no such classification has been attempted and none such has been contended for in this case.

A classification of stevedores based upon the number of days worked during the year or the amount of wages received during the year, is purely mythical. There is no logical reason for dividing the workers into three classes, as on such a basis of classification each individual would be in a class by himself.

The facts in this case are directly in point with the facts in the *Gunther* case. Claimant worked at the same kind of labor, received the same compensation of 90¢ an hour as did the worker Davidson. Davidson was a man who had worked substantially the whole of the preceding year. Claimant was a man who had not

worked substantially the whole of the year, but who had followed continuously the occupation of stevedore. It was the practice of such employees to go to certain points or places on or near the waterfront and seek work and to be on hand daily ready for such employment. Under similar state of facts in the *Gunther* case it was held that the provisions of Subdivision B should have been applied, as in the language of the Statute those provisions can reasonably and fairly be applied.

It is therefore respectfully submitted that the Commissioner, in making his award, found that the stevedores working in the port of San Francisco were not divisible into three distinct classes as contended by appellees, and that in this connection his finding is amply supported by the testimony of the witness Stein and as such is conclusive, and that, there being no such classification, and the claimant and Davidson being in the same class, the case is clearly within the rule of *Gunther v. United States Employees' Compensation Commission,* supra.

Appellants respectfully contend that the decision of the District Court is erroneous and should be reversed.

Respectfully submitted,

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